2011

Utah v. Derren Berriel : Brief of Petitioner

Utah Court of Appeals

IN THE UTAH SUPREME COURT

STATE OF UTAH, Respondent, vs. DARREN BERRIEL, Petitioner.	Case No: 20110926-SC

BRIEF OF PETITIONER / DEFENDANT UPON WRIT OF CERTIORARO

CERTIORARI REVIEW FROM DECISION OF THE UTAH COURT OF APPEALS

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Oral Argument Requested

Appellant is currently incarcerated at the Utah County Jail

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JURISDICTION OF THE UTAH SUPREME COURT

This Court has jurisdiction in this matter pursuant to the provisions of Utah Code § 78A-3-102(5).

ISSUES PRESENTED AND STANDARDS OF REVIEW

Issue 1. Whether a majority of the panel of the court of appeals erred in affirming the district court's refusal to give a jury instruction on defense of another person pursuant to Utah Code § 76-2-402. On certiorari, this Court "review[s] the decision of the court of appeals, not the decision of the trial court." *Bear River Mut. Ins. Co. v. Wall*, 978 P.2d 460, 461 (Utah 1999). The court of appeals' decision is reviewed for correctness. *Harold Selman, Inc. v. Box Elder Cnty.*, 2011 UT 18, ¶ 15, 251 P.3d 804.

CONTROLLING STATUTORY PROVISIONS

Utah Code §§ 76-2-402 and 76-5-103 are set forth in full in the Addenda.[1]

STATEMENT OF THE CASE

A. Nature of the Case

Defendant, Darren Berriel, appeals from the decision of the Utah Court of Appeals affirming in part the rulings and orders of the Honorable Gary D. Stott and the Honorable David N. Mortensen, following Berriel's conviction, judgment and sentencing on one count of aggravated assault under Utah Code Annotated § 76-5-103.

B. Trial Court and Court of Appeals Proceedings and Disposition

On October 3, 2008 Darren Berriel was charged by information with AGGRAVATED ASSAULT, RIOT, and POSSESSION OF A DEADLY WEAPON W/ INTENT TO ASSAULT, each count raised one degree by a gang enhancement, at his initial appearance and was appointed a public defender. R. 11-12.

The case was assigned to Judge Gary D. Stott who held a preliminary hearing on October 30, 2008. R. 141. At the preliminary hearing the State moved to dismiss count 2, RIOT, which the court granted. R. 141: 44-45. Defense counsel argued that the gang enhancement should not be bound over. R. 141: 45-46. Defense counsel also argued a defense to the assault by a lawful use of force to protect another person from imminent harm. R. 141: 46. The court found probable cause to believe the defendant committed

[1] The trial court's decision in question took place on March 31, 2009. Since that time, Utah Code §76-2-402 has been amended, however the changes do not seem affect Defendant's claims. See 2010 Utah Laws Ch. 324 (H.B. 263) and 2010 Utah Laws Ch. 361 (H.B. 78) (the changes appear only to make the statute gender neutral and renumber several of the subsections). This brief will refer to the current version.

both the aggravated assault and the possession of deadly weapon with intent to assault. R. 141: 47. The court found there was enough evidence to support the gang enhancement based on a written statement admitted through the police officer. R. 141: 48.[2] Finally, the court found insufficient evidence to support the defense of a third person. R. 141: 48.

On November 6, 2008 the court held an entry of plea hearing. R. 26, 142. The court addressed defense counsel's objection to the gang enhancement being based on a written statement presented by the police. R. 142: 3-4. The court modified its bind over by striking the gang enhancement because, after reviewing the rule, it found that "although Paragraph 9 [of Rule 1102] indicates other hearsay evidence with similar indicia or reliability regardless of admissibility at trial, can be received, [the court] didn't have any basis on which to conclude that this statement could be classified as reliability [sic] to support bind over." R. 142: 3-4.

Following the court's modification, the State requested a new preliminary hearing in order to produce evidence supporting the gang enhancement. R. 142: 6. The court granted that request and scheduled a second preliminary hearing on December 4, 2008. Berriel waived the second preliminary hearing and he entered not guilty pleas to counts 1 and 3 on December 4, 2008 and the gang enhancement was not readdressed. R. 31.

On March 18, 2009 Berriel filed requested jury instructions, which included instructions defining justification of force necessary for self-defense and defense of a third person. R. 39-35.

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[2] Defense counsel objected to the admission of the written statement of Mr. Carlisle, who was at the scene, arguing that Rule 1102 requires a warning against perjury in order to be admitted at a preliminary hearing. R. 141: 41.

Following the close of the State's evidence defense counsel moved for a directed verdict and a motion to merge Count 2 into Count 1.[3] R. 144: 262-63. The court denied the directed verdict motion ruling that Berriel had not met the burden of establishing that there was no evidence that raised a question of material fact. R. 144: 263. The court denied Berriel's merger request stating that when Berriel used the weapon he placed himself in jeopardy of the assault charge and the two charges are "not one in the same charge." R. 144: 264.

After the defense rested the parties argued about Berriel's proposed jury instructions on use of force for self-defense and defense of a third person. R. 144: 276-87. The court denied Berriel's request for a self-defense instruction stating "the evidence clearly establishes that defendant initially provoked the confrontation as an excuse to confront for whatever reason..." R. 144: 288. The court denied Berriel's request for a defense of a third person stating "[t]here was no evidence that at the time that Luis got out of the car, that [the third person] at that time was doing anything to call the defendant, to ask the defendant, to seek her immediate protection as required by the statute." R. 144: 289.

The court returned from a break and changed its ruling with respect to the jury instructions. It noted that there was enough evidence to justify instructing the jury on the issue of self-defense but not on the issue of defense of a third person. R. 144: 294. The

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[3] The first information charged 3 counts. Count 1 was AGGRAVATED ASSAULT, Count 2 was RIOT, and Count 3 was POSSESSION OF A DANGEROUS WEAPON W/ INTENT TO ASSAULT. The RIOT charge was dismissed and at trial Count 3 was renumbered as Count 2.

court then provided modified versions of Berriel's requested instructions for self-defense, retreat, actual danger, and burden of proof excluding any mention of defense of a third person. R. 110, 109, 108, 106. The court made it clear that Berriel "can't use the claim that [the third person] was getting beat up" as justification for his actions because there was "not a reasonable basis to justify instructing the jury for defense of another." R. 144: 297, 304-05.

Following deliberations, the jury found Berriel guilty on Count 1, AGGRAVATED ASSAULT, and guilty on Count 2, POSSESSION OF A DEADLY WEAPON WITH INTENT TO ASSAULT. R. 144: 348-50.

On July 16, 2009 Darren Berriel was sentenced to 0 to 5 years in the Utah State Prison for the 3rd degree felony aggravated assault, and one year in the Utah County Jail for the Class A misdemeanor possession of a deadly weapon with intent to assault. Those sentences were suspended. Berriel was placed on probation for 36 months and ordered to serve 270 days in jail with credit of 35 days for time served and ordered to pay a $991 fine. R. 145: 12-14.

On August 14, 2009 Berriel filed his timely Notice of Appeal. R. 128.

On September 15, 2011, a majority of the court of appeals panel affirmed Berriel's conviction for AGGRAVATED ASSAULT, concluding that "while there was some evidence that Berriel had information that led him to believe [the victim] had been violent toward [the third person] in the past... a jury could not reasonably have concluded that the nature or immediacy of the danger to [the third person] reasonably justified a belief that it was probable that [the victim] was about to use 'unlawful force' against [the third

person]." *State v. Berriel*, 2011 UT App 317, ¶ 6, --- P.3d ----.[4] In essence, the majority found that the evidence did not show the threat was imminent.

Judge Thorne wrote a concurring and dissenting opinion finding that the questions of imminence and reasonableness are expressly assigned "to the 'trier of fact'". *Berriel*, 2011 UT App 317, ¶ 20. He added, "[a] reasonable jury could easily conclude from this testimony that, at the time Berriel spoke with [the third person] on the phone, she was in imminent danger..." and "once Berriel had a reasonable basis to believe that [the third person] was in imminent danger due to her phone call, his actions in her defense were potentially justifiable under Utah Code section 76-2-402 until such time as Berriel had reason to believe that the danger to [the third person] had passed." *Id.*, at ¶¶ 22-23.

STATEMENT OF FACTS

Luis Trejo is 22 years old. R. 143: 112. He lives with his girlfriend, Rachel Southwick, who is pregnant with his child. R. 143: 87, 108-09. Rachel is 16 years old, lives with her mother, stepfather, brother, and boyfriend Luis in Orem. R. 143: 130. According to Luis, he has never hit Rachel but he did push her on to the couch during a fight, after the incident with Berriel. R. 143: 109. According to Rachel, Luis has smacked her, pushed her head against the wall, and pushed her into the car causing a scar on her face. R. 143: 131-32. According to Luis, Rachel got that scar because she kicked

[4] The Court of Appeals reversed and vacated Berriel's conviction for POSSESSION OF A DEADLY WEAPON WITH INTENT TO ASSAULT, finding that "because 'the [arguments,] instructions[,] and evidence at trial' did not clearly inform the jury that it had to find a separate factual basis for the possession [charge] beyond the possession necessary to commit the aggravated assault, his conviction for possession of the knife with intent to assault is not independently sustainable. *Berriel*, 2011 UT App 317, ¶ 16 (*citing State v. Chukes*, 2003 UT App 155, ¶ 23, 71 P.3d 624).

the car door and it hit her in the face. R. 143: 111. Luis said that he has never hit Rachel and does not know why she was telling people he had. R. 143: 125. Rachel told her friend Krissy Ferre about being abused. R. 143: 179, 180. On one occasion Krissy witnessed Luis throw Rachel across the room. R. 143: 179.

Rachel knows Darren Berriel from school. They were friends and she stayed overnight at his house once. R. 143: 135-36. Rachel was close to Berriel and she talked to him about things going on in her life. R. 143: 152. Rachel cannot remember telling Berriel about being abused by Luis but she remembers testifying at the preliminary hearing that she told Berriel about the abuse and that it made Berriel mad. R. 143: 148-50. On one occasion Rachel went to Berriel's house to tell him about the abuse she was receiving from Luis. R. 143: 151. Rachel also told her friend Krissy Ferre about the abuse and went with Krissy to the police to report the abuse but was told the police could not do anything without proof. R. 143: 154. Scott Carlisle, a friend of Berriel and Rachel, knew Rachel had been abused and has seen her come to school with black eyes. R. 144: 260. Krissy testified that Rachel called Berriel on the day of the incident but did not know what the call was about. R. 143: 202. Sometime before the incident, Luis smacked Rachel and she called Berriel and told him about it. R. 143: 160.

Luis knows Darren Berriel. They used to be friends but they lost touch and had not seen each other for some time before the night of the incident. R. 143: 95. Luis is about four years older than Berriel. R. 143: 112. He was approximately 180 pounds and 5 feet 4 inches. R. 143: 115. Luis used to hang out with the guys in "801", what Luis called a party crew. R. 143: 113. According to Sergeant William Young, the Orem Gang

Unit Supervisor, 801 is a street gang that Luis used to hang with but Young was not aware of Luis being involved in any gang activity in the last few years. R. 143: 127-29.

A few weeks before the night of the incident Luis and Rachel went to Berriel's house. R. 143: 95. They went there because Luis had returned home from work Rachel was not home and she later told Luis she had been with Berriel. R. 143: 96. When Rachel told Luis she had stayed the night with Berriel Luis got angry. R. 143: 134, 137. They went to Berriel's so Luis could confront him about whether she had been with Berriel and to see what was going on. R. 143: 97. When they got to Berriel's house his father, David Berriel, answered the door and told Luis that Darren was not home. R. 143: 97. According to David, when Luis showed up at the house Luis skid his car across his David's lawn. R. 144: 269. Darren Berriel was actually at home but David said he was not because Luis was angry and he was trying to protect his son. R. 144: 271.

While Luis was at the door David saw a girl get our of Luis's car. Luis yelled at her to get back in the car and then grabbed her and violently threw her in the car. R. 144: 270. According to Luis, he was helping Rachel into the car and he did not push her. R. 143: 98, 110. According to Rachel, Luis got mad because she got out of the car so he pushed her in the back pretty hard, forcing her to hit the car, causing the scar on her nose. R. 143: 133.

On the night in question, before the incident, Luis answered several phone calls from Berriel. At first Luis did not know who was calling but later recognized the voice as Berriel's. R. 143: 90. On the phone Berriel asked Luis if he was an R.J., a member of a local street gang. R. 143: 90. According to Luis, Berriel is a member of the South

Town Gang. R. 143: 93. During the phone call they did not discuss Rachel; instead they cursed at each other and then Luis hung up. R. 143: 91. Berriel called back several times and Luis again hung up on him. R. 143: 92. Luis said he was not angry with Rachel when Berriel called but he did ask her how Berriel got the phone number. R. 143: 98, 118.

Later that night, around 8:30, Luis took Rachel to pick up her little brother at a friend's house to bring him home. According to Luis, he and Rachel were having normal conversations during the drive and Luis did not know that Rachel was telling Berriel about being abused. R. 143: 94, 116. Eric, Rachel's brother, does not remember whether anyone was talking on the ride home, or whether or not anyone was angry. R. 143: 166. Rachel testified that Luis was not angry during the drive and there was not any fighting or abuse that day. R. 143: 139, 138. However, Rachel did tell Krissy that Luis had elbowed her in the chest that day. R. 143: 202. Rachel remembered testifying at the preliminary hearing that she called Berriel shortly before the incident and told him that Luis had been hurting her; she asked him to come over and help her. R. 143: 150. After talking to Berriel, Rachel believed he was going to come over and talk with Luis but not hurt him. R. 143: 150.

That evening Berriel and some of his friends were hanging out, planning to go to the movies. R. 144: 240. The group of friends consisted of Miguel, Isaac, Aaron, Berriel and Scott. R. 144: 243. Berriel's friend, Isaac Torres, was in the back seat of Berriel's car when Berriel got a phone call. R. 144: 241. Berriel's friend Scott Carlisle had the phone and he saw on caller ID that it was Rachel who was calling. R. 144: 255. Scott

heard a girl screaming on the phone then Berriel walked away to talk. R. 144: 255-56. Based on the screams Scott thought Rachel was being beaten right then. R. 144: 260. Berriel returned and said they were going to Rachel's house because she was getting beat up. R. 144: 256, 261.

Rachel called Berriel "shortly before the fight" and "told him that Luis had been hurting [her]." R. 143: 150. She called Berriel and told him "Luis was hurting [her] again and asked [Berriel] to help [her] and [she] thought [Berriel] was going to come over and talk to Luis." R. 143: 152. She knew Berriel was coming over to confront Luis about the abuse. R. 143: 150. Rachel's testimony was unclear as to exactly when the phone call took place. See R. 143: 203-04 (she did not have a clear memory of when the phone call occurred but she did not make any calls from the car or right before she left), but see R. 143: 205-06 (she remembered testifying that she called Berriel shortly before the fight).

Immediately after the call Berriel and his friends went to Rachel's house instead of going to the movies. R. 144: 242, 143: 215. Berriel told his friends that Luis had been hitting Rachel. R. 144: 242. According to Miguel, they were going to help a friend who had told them her boyfriend was hitting her. R. 143: 212-13. Berriel called Krissy and told her he was going to Rachel's house and that Krissy needed to get Rachel away from the house. R. 143: 181.

According to Isaac, when they got to Rachel's house Isaac did not really know what was going to happen or what was actually going on. Isaac and Aaron were just standing on the street corner talking until a car showed up. R. 144: 243. Scott testified that when they got to Rachel's house no one was there but as they walked back to the car

Luis's car drove up. R. 256. Rachel said she saw Miguel, Scott and Isaac with Berriel. R. 143: 140. Luis said he saw 6 or 7 guys in addition to Berriel. R. 143: 99, 120.

When the Luis' got to Rachel's house it stopped and Luis jumped out of the car and ran toward Berriel. R. 144: 256. Rachel said she and her brother got out of the car and her friends, Krissy and Daniel, were there too. R. 143: 141-42. According to Luis, he got out of the car and walked toward Berriel telling him "You don't need a knife to fight me." R. 143: 100-01, 121. Luis also told Berriel, "You don't know what's going on, stay out of it." R. 144: 266. Eric saw Luis walk toward Berriel. R. 143: 167. Scott saw Luis jump out of the car and run toward Berriel, Berriel stepped back and Luis kept coming so Berriel swung at him. R. 144: 257. Luis testified that Berriel threw something and then stabbed at Luis catching him on the arm with a folding pocket-knife. R. 143: 101. Rachel and Eric saw Luis and Berriel in the street; Rachel did not see a knife but she saw the stabbing motion. R. 143: 143, 168. Krissy saw Berriel stab Luis. R. 143: 185. Luis testified that at the time of the stabbing Rachel was about 15 to 20 feet from the confrontation. R. 143: 105. Eric testified that at the time of the confrontation Rachel was "kinda close" to him (R. 143: 170, (although he didn't see where she went (R. 143: 167))), approximately the distance from the State's attorney to the witness box (R. 143: 171), and he, Eric, was about 15 yards from Berriel and Luis, or approximately the distance from the lectern in the courtroom to the witness (R. 143: 174).

According to Luis, after he was stabbed he ran to the back yard to get his dog because it was not a fair fight. R. 143: 106. When he returned Berriel and his friends were gone so Luis put the dog in his car and went look for them. R. 143: 106. Rachel

saw Luis get his dog and go after Berriel and his friends. R. 143: 145. When Luis came from the back yard with the dog he got in his car and told Krissy and Rachel to stay there because he was mad, then he followed Berriel up the hill. R. 143: 185.

The other people who were with Berriel did not do anything. R. 143: 186. Miguel did not see the stabbing, it looked like they were talking and then Luis started running. R. 143: 211. Isaac said he saw Luis and Berriel talking then he saw them run off so he ran with Berriel. R. 144: 243-44. According to Scott, after Berriel punched Luis, Luis ran away so Berriel and his friends ran too. R. 144: 257. They ran to the car and Berriel took them home. R. 244: 257. Isaac asked Berriel what had happened and Berriel said he "shanked" Luis. R. 144: 250. Berriel told Isaac he did it because Rachel was crying because Luis was hitting her so he had no choice. Id.

Rachel said at the moment Berriel stabbed Luis, Luis was not doing anything to her, he was not hitting her or threatening her. R. 143: 144-45, 142. She testified that at the moment Berriel stabbed Luis, Luis was not hurting her, she clarified "At that moment…" R. 143: 144-45. After Luis left with the dog Krissy took Rachel to her house because when Luis is mad he hits people so she wanted to take Rachel away from him. R. 143: 185.

Luis could not find Berriel so he returned to Rachel's house; when she was not there he went to Krissy's. R. 143: 107-08. Others took Luis to the hospital where he received some stitches for his wound. R. 143: 108. Berriel later turned himself in to the police and was arrested for the assault. R. 143: 223, 230.

SUMMARY OF ARGUMENT

Berriel asserts the majority of the court of appeals erred by finding that there was no reasonable basis upon which the jury could have found a reasonable doubt in the State's burden to disprove defense of a third person. A defendant is entitled to have the jury instructed on his theory of the case if there is any reasonable basis in the evidence to justify it. Based on the testimony on the record there was evidence to support the theory that Berriel reasonably believed it was necessary to use force against Luis in order to protect Rachel from Luis' imminent use of unlawful force. Even though that evidence may conflict with other evidence, the trial court and the court of appeals should not have weighed the evidence in order to find any threat was not in fact imminent. Because it is not unreasonable, based on the testimony, that Berriel could have believed Rachel was in danger at the time of he confronted Luis, the court of appeals erred in upholding the trial court's refusal to instruct the jury.

If this Court finds the court of appeals' affirmation of the trial court's denial to instruct the jury on Berriel's theory to be an error this case should be remanded for a new trial.

ARGUMENT

THE MAJORITY OF THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO INSTRUCT THE JURY ON DEFENSE OF A THIRD PERSON PURSUANT TO UTAH CODE § 76-2-402.

Relevant Law

Utah Code § 76-2-402(1) provides "A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force

or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

Utah Code § 76-2-402(5) authorizes the trier of fact to consider several factors in determining imminence and reasonableness as it relates to self-defense or defense of another. The factors are "(a) the nature of the danger; (b) the immediacy of the danger; (c) the probability that the unlawful force would result in death or serious bodily injury; (d) the other's prior violent acts or violent propensities; and (e) any patterns of abuse or violence in the parties' relationship." UTAH CODE § 76-2-402(5). These factors are not only relevant to the factfinder when deciding reasonableness or imminence but also to a court when considering whether an issue with respect to self-defense of defense of others has been raised by the evidence.

A defendant may have the jury instructed on the use of force theory so long as there is a reasonable basis in evidence to support it. "The general rule is that a defendant's entitlement to a jury instruction on his theory of the case is conditioned upon the existence of a reasonable basis in the evidence to justify the giving of the proposed instruction." *State v. Stone*, 629 P.2d 442, 446 (Utah 1981); *see also State v. Torres*, 619 P.2d 694, 695 (Utah 1980) ("Each party is... entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it"); *State v. Eagle*, 611 P.2d 1211, 1213 (Utah 1980) ("A defendant's entitlement to a jury instruction on his theory of the case is not absolute. It is necessarily conditioned upon the existence of a reasonable basis in the evidence to justify the giving of the proposed instruction.").

Utah Cases -

This Court "drew the guidelines in this area: If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense." *State v. Brown*, 607 P.2d 261, 265 (Utah 1980) (*citing State v. Castillo*, 457 P.2d 618 (1969)). Thus, even where the evidence does not unanimously support the defendant's theory, he is entitled to have the jury instructed on the theory if some evidence presented raises a reasonable basis.

The evidence supporting the justification defense need not persuade the trial court of the reasonable doubt. In fact, when a trial court considers a defendant's request to instruct the jury on a justification defense the court is not supposed to consider the relative merit of conflicting evidence, but instead only determine whether some evidence has been presented which could provide a rational basis for the theory. "We are not concerned with the reasonableness, nor the credibility of the defendant's evidence relating to his claim of self-defense. Each party is, however, entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it." *State v. Torres*, 619 P.2d 694, 695 (1980). As soon as evidence has been presented that, if believed, could support reasonable doubt as to whether the defendant's conduct was justified, the defendant is entitled to have the jury instructed fully and clearly on the law of justification, whether or not the court believes it or finds it to be outweighed by conflicting evidence.

This Court in *State v. Knoll* characterized the amount of evidence required to raise

the issue to the jury as "some evidence" and stated that "if the issue is raised, whether by the defendant's or the prosecution's evidence, the prosecution has the burden to prove beyond a reasonable doubt that the [conduct] was not in self-defense." *State v. Knoll*, 712 P.2d 211, 214-15 (Utah 1985). In *Knoll* the jury was instructed on self-defense, so it is quite different than this case where the trial court refused the requested instruction, however, the *Knoll* opinion does contain very relevant language. In *Knoll* the defendant killed another man and claimed the killing was justified as self-defense. At trial the jury was instructed on self-defense but the defendant was convicted of manslaughter. On appeal the defendant claimed the state should have been forced to disprove the existence of self-defense, as a prima facie element of homicide, arguing such an element is necessary because the statute requires "*unlawfully* caus[ing] the death of another." *Id.*, at 213 (emphasis added).

This Court rejected that claim but "explicitly and firmly emphasize[d] that [*Knoll*] does not alter the long standing law of this State concerning the procedural principles that govern when and how the issue of self-defense is properly raised and the allocation of the burden of persuasion with respect to that issue; indeed, we reaffirm those rules." *Id.*, at 214. Those long standing rules include the principle that "when there is a basis in the evidence, whether the evidence is produced by the prosecution or by the defendant, which would provide some reasonable basis for the jury to conclude that a killing was done to protect the defendant from an imminent threat of death by another, an instruction on self-defense should be given the jury. And if the issue is raised, whether by the defendant's or the prosecution's evidence, the prosecution has the burden to prove beyond

a reasonable doubt that the killing was not in self-defense." *Id.*, at 214 (*citing State v. Starks*, 627 P.2d 88, 92 (Utah 1981); *State v. Torres,* 619 P.2d 694, 695 (Utah 1980); *State v. Wilson,* 565 P.2d 66, 68 (Utah 1977)).

In *Knoll* "[c]ertainly there was 'some evidence' of self defense... that required the giving of an instruction on the State's burden of proving self-defense beyond a reasonable doubt", even though the justification evidence conflicted with other testimony presented. That evidence was the defendant's own testimony. The defendant testified that, while the victim pulled the defendant's head forward and down, the defendant "continued to swing the knife at [the victim] until he felt the danger was over." *Id.*, at 212. "An autopsy revealed that the stab wounds in the victim's chest were deep puncture wounds inflicted from various angles and that the cause of death was multiple stab wounds, one of which penetrated Wilson's heart and liver and was itself fatal." *Id.* Despite the fact that the State's evidence conflicted with the defendant's testimony (i.e. the victim's wounds were not slashes, as would be expected from the repeated swinging of a knife, but rather deep punctures), because some evidence of self-defense was presented upon which a reasonable basis for the justification could be found, the trial court was required to give the instruction "on the State's burden of proving self-defense beyond a reasonable doubt" and let the jury decide the merits. *Id.*, at 215.

In *State v. Brown*, 607 P.2d 261 (Utah 1980), the defendant was convicted of capital murder and appealed the trial court's refusal to instruct the jury on the law of self-defense. *Brown*, 607 P.2d 261, 265. The day of the killing the defendant was awaiting a trial for second-degree murder in another case and two of his friends had been

subpoenaed to testify at that trial. The defendant went with one of the would-be witnesses and eventual victim to a house trailer in the wilderness where the other would-be witness was already hiding out so as not to be forced to testify. *Brown*, 607 P.2d at 262-63. Testimony at trial showed that the defendant grabbed a gun from a glove box and chased the victim around the trailer firing a total of five shots. *Brown* at 263. One witness heard the victim say, "Don't, Paul, don't" to the defendant as they ran around the trailer. *Id.*, at 263. The defendant and some friends then dug a grave and buried the victim. *Id.* The medical examiner testified the victim had been shot three times, once in the thumb, once in the back, and once through the temple. *Id.*, at 263.

The defendant testified that he went into the trailer and saw the victim pickup a club and was afraid the victim was going to hurt him. *Id.* at 264. He said that he had picked up the gun to defend himself, that "when he accosted [the victim] with the weapon [the victim] took a step toward him but he did not raise the club..." *Id.*, at 264. The defendant then said he blacked out until he was standing over the dead victim with a gun. *Id.*

This Court ruled that the lower court properly refused the self-defense instruction because there had been no evidence that the victim had threatened the defendant and "no credible evidence that defendant might have been justified in using deadly force to protect himself or that he reasonably believed himself to be in danger." *Id.* at 266. The Court found "the evidence unmistakably show[ed] instead that defendant was the aggressor." *Id.*, at 266.

In *State v. Castillo*, 457 P.2d 618, 619 (Utah 1969), the defendant was convicted

of assault with a deadly weapon and he appealed claiming the trial court erred "by its refusal to instruct the jury as to his theory of the case." Defendant went to the house of his ex-wife armed with a knife, "which he claimed he had brought to defend himself, since he feared that [the ex-wife's brother] would have a stick" since he had seen "the stick under a couch cushion on a previous visit." *Castillo*, 457 P.2d 618, 619. The ex-wife and her brother testified that as they tried to leave the defendant pulled out the knife and started toward the brother so the ex-wife "interceded and grabbed the knife." *Castillo*, at 619. They testified the defendant then retrieved the knife and stabbed the ex-wife. She then fled while the brother and the defendant struggled with the stick and the knife. *Id.* The brother was stabbed and the defendant sustained some wounds. *Id.*

Defendant testified that he recalled being hit from behind, knocking him to the floor, and then the brother came at him with the knife. *Id.* "Defendant had no further recollection of the ensuing moments; he merely remembered that he regained possession of the knife and was in a position on top of Santana, who was pleading with defendant not to hurt him any more." *Id.* In finding the defendant did not present "substantial evidence in support of his theory" of self-defense this Court emphasized that although the defendant had argued for a theory of self-defense he did not actually present any evidence to support the theory. "He claims that he has absolutely no recollection of his victim being stabbed but merely hypothesizes that apparently she sustained wounds to two diverse parts of her body while he was legitimately exercising his right of self-defense." *Id.*, at 620. "While the theory of counsel, persistently and strenuously urged, was that of self-defense, it was nevertheless all theory and no evidence, all shadow and no

substance." *Id.*, at 621.

In *State v. Spillers*, 2007 UT 13, 152 P.3d 315, the defendant was charged with first degree murder after he shot the victim three times. There were no eyewitnesses to the shooting but two witnesses in the house at the time of the shooting "testified that they heard Defendant and [the victim] arguing, followed by a series of gunshots." *Spillers*, 2007 UT 13, ¶ 4. Defendant testified that he and the victim were arguing and the victim retrieved a gun from the couch and began threatening him with it making the defendant nervous. *Spillers*, at ¶ 3. Defendant testified the victim them struck him in the head with the gun making him feel "cloudy, dazed, uncomfortable, and scared. *Id.* When the victim approached again the defendant "with his arm cocked to strike again", defendant "pulled a gun from his waistband and shot [the victim] in the chest." *Id.* The defendant requested an instruction for imperfect legal justification manslaughter but the district court found "that the evidence presented at trial did not warrant a jury instruction" on that theory. *Id.*, at ¶ 9. The jury was instructed on perfect self-defense. *Id.*, at ¶ 23.

The defendant appealed that denial and the Utah Court of Appeals reversed. This Court accepted the State's petition for review on certiorari and upheld the court of appeals' reversal. The relevant question this Court considered was "whether there [was] a rational basis to acquit Defendant of murder and convict him of manslaughter" based on the imperfect legal justification. *Id.*, at ¶ 12. In referring to the evidence supporting the perfect self-defense claim this Court found that "that the evidence could also be interpreted by a jury that Defendant was entitled to defend himself against Jackson, but not entitled to use deadly force when Jackson only struck Defendant with his gun." *Id.*,

at ¶ 23. Just as with regular self-defense, because there is a version of the facts presented upon which the theory could be based the trial court should have given the lesser included on imperfect justification.

In *State v. Garcia*, 2001 UT App 19, ¶ 1, 18 P.3d 1123, the defendant was convicted of manslaughter for a shooting at a club. *Garcia* is another case where the jury was instructed on self-defense making it a different appeal than this case, but the holding contains relevant language and reasoning. At trial the State presented evidence that the defendant was the aggressor and in response the defendant argued he acted in self-defense. The jury was instructed on self-defense but the instruction failed to specify the burden of proof. *Garcia*, 2001 UT App 19, ¶ 5. The defendant appealed that failure and on appeal the State argued that the defendant was not entitled to jury instructions on self-defense as a matter of law, so any deficiency as to the burden in the instruction was harmless. *Garcia*, at ¶ 8. The State claimed that evidence showed the defendant was the aggressor and as such was not entitled to a self-defense instruction. But the court of appeals disagreed and found that even where the evidence showed the defendant may have been the aggressor, the jury should still be instructed on self-defense leaving the factual conclusion to the jury. *Id.*, at ¶ 9.

In *Garcia* the defendant entered a nightclub armed with a handgun and observed the victim allegedly assaulting one of the defendant's friends. *Id.*, at ¶ 2. The defendant approached the victim and a verbal and physical altercation ensued, but it ended when the defendant pulled the gun from his waistband. *Id.* The victim backed off at the sight of the weapon and the defendant returned the gun to his pants. The defendant then testified he

thought he saw the victim reach to his waist for a gun so the defendant again pulled his gun, this time firing and killing the victim. *Id.* In upholding the self-defense claim the court noted "[e]ven when the possibility that the defendant was the aggressor is evident during trial, the defendant is still entitled to self-defense instructions" and the jury should be given the law on self-defense and be allowed to decide whether or not it apples. *Id.*, at ¶ 9.

In another case, *State v. Eagle*, 611 P.2d 1211 (Utah 1980), the defendant was convicted of theft of clothing where he and a partner tried to conceal clothing inside an overcoat. When the two realized store employees were watching them they dropped the merchandise and tried to escape. *Eagle*, 611 P.2d 1211, 1212. At trial the defendant requested a jury instruction on the theory of termination of criminal conduct, which requires a showing that the termination is voluntary and occurs prior to commission of the offense. *Eagle*, 611 P.2d at 1213. The Utah Supreme Court upheld the lower court's refusal of the instruction noting that dropping the items after being detected was neither a voluntary act, nor did it occur before he took possession of the goods with the purpose of depriving the owner thereof. *Id.* The important fact there was that, even if believed, the defendant's evidence (dropping the items and leaving) would not support a reasonable doubt that he had not committed the offense because the supposed termination occurred after the offense had been completed. Based on the evidence, the theft was completed prior to the alleged termination making the defense useless. Thus, the evidence presented did not create any reasonable basis to support the defense and the defendant was not entitled to the instruction.

Case in other jurisdictions –

In several jurisdictions with self-defense laws similar to Utah's, when a defendant seeks to instruct the jury on self defense or defense of a third person the trial court must view the evidence supporting the theory in the light most favorable to the defendant when it considers whether or not the instruction is required; and, the court should resolve questions of fact in favor of the defendant even when the evidence supporting the defense is weak or controverted. *See State v. Solomon*, 930 A.2d 716, 721 (Conn. App. 2007) ("A defendant who asserts a self-defense claim for which there is evidence produced at trial to justify the instruction is entitled to a self-defense instruction, no matter how weak or incredible the claim."); *State v. Sullivan*, 695 A.2d 115, 117 (Maine 1997) (when considering a self-defense jury instruction "[t]he court must view the evidence in the light most favorable to the defendant."); *Commonwealth v. Pike*, 701 N.E. 951, 955 (Mass. 1998) ("a self-defense instruction must be given... only if the evidence, viewed in the light most favorable to the defendant, permits at least a reasonable doubt that the defendant reasonably and actually believed that he was in imminent danger..."); *State v. Zumwalt*, 973 S.W.2d 504, 507 (Mo. App. 1998) ("In deciding this question [whether or not to instruction the jury on self-defense], trial courts must view the evidence in the light most favorable to the accused."); *Hudson v. State*, 956 S.W.2d 103, 104 (Tex. App. 1997) ("When properly requested, a defendant is entitled to a charge on every defensive theory raised by the evidence, regardless of the strength of the evidence or whether it is controverted. If the testimony or other evidence, when viewed in a light most favorable to the accused, does not establish a case of self-defense, an instruction is not required.");

Render v. State, 347 S.W.3d 905, 922 (Tex. App. 2011) ("A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence regardless of whether that evidence is strong, weak, unimpeached, or contradicted and regardless of what the trial court may think about the credibility of the defense. However, if the evidence, viewed in the light most favorable to the defendant, does not establish self-defense, the defendant is not entitled to an instruction on the issue."); *People v. Jones*, 676 N.E.2d 646 (Ill. 1997) (where there is some evidence to support an affirmative defense instruction, the trial court's refusal to instruct the jury constitutes an abuse of discretion even if the evidence is conflicting; even very slight evidence upon a given theory of a case will justify the giving of an instruction.).

Berriel could not find any Utah cases on this precise point but would point to *State v. Crick*, 675 P.2d 527, 539 (Utah 1983), where when considering whether a defendant is entitled to a lesser included offense jury instruction the court views "the evidence and the inferences that can be drawn from it in the light most favorable to the defense." Berriel suggests that this Court should explicitly endorse this view in the context of a request for a justification instruction in light of this state's strong attitude toward protecting a defendant's due process rights and the similarity between the request for a lesser included instruction and the request for a justification instruction.

In *State v. Solomon* the police responded to a call that the defendant and his wife were fighting, when the police arrived they found the wife with fresh scratches on her neck. *Solomon*, 930 A.2d 716, 719. At trial the wife testified that dinner was being prepared and the smoke detector sounded so she opened the door to ventilate the smoke,

which started an argument. She testified the fight escalated when she tried to leave the apartment and the defendant blocked her exit, prevented her from calling the police, and grabbed her by the throat, causing the scratches. *Solomon*, 930 A.2d 716, 720. The defendant testified that the fight occurred before the smoke alarm and that the fight was started by the wife, who was intoxicated. He claimed the fight became physical when the wife threw a bottle of wine at him, swung a chair leg at him, and struck him repeatedly and asked him to leave. *Id.* He refused and then they addressed the smoke alarm. He testified he never struck her or scratched her. *Id.*

At trial the defendant did not request a jury instruction on self-defense so on appeal his claim was that the trial court should have charged the jury on self-defense sua sponte "because there was evidence adduced at trial to support such a charge." *Id.*, at 720-21. The Connecticut Court of Appeals rejected that claim because the defense was not requested at trial and, because it was not a constitutional claim, the appellate court would not review it. *Id.*, at 721. However, the court did note that "[a] defendant who asserts a self-defense claim for which there is evidence produced at trial to justify the instruction is entitled to a self-defense instruction, no matter how weak or incredible the claim." *Id.* Even though his claim was incredible, due to the physical evidence observed by the police, the defendant produced some evidence of self-defense and was thus entitled to an instruction if he had requested it.

In *Sullivan* the defendant, a war veteran suffering from post-traumatic stress disorder, and his wife went to a bar to confront someone about an earlier incident. That person saw the wife and immediately pushed the wife back towards the door. The

defendant was then pushed down and when he saw "'a whole bunch of people' coming toward him from the dance hall" so he "pulled out a gun and fired into the crowd, injuring three people." *Sullivan*, 695 A.2d 115, 116. He testified at trial that he was scared because there was a large group of people and he believed they were hostile. *Sullivan*, at 116. At trial he was denied a requested a self-defense jury instruction and was found guilty on three counts of aggravated assault. *Id.*, at 117. On appeal he claimed the trial court should have granted his requested instruction; he claimed defense of another was in issue because the evidence was "sufficient to make the existence of all the facts constituting the defense a reasonable hypothesis for the factfinder to entertain", as required by statute. *Id.*

Maine's Supreme Court agreed with the defendant because, "[v]iewing the evidence in the light most favorable to Sullivan, we conclude that a jury rationally could entertain a reasonable doubt on the issues of whether Sullivan was the initial aggressor and whether he knew that he and his wife could have safely retreated from the encounter." *Id.*, at 119. The court found that after the defendant fell to the ground he was "not precluded from claiming self-defense if he did *not* know that his wife could safely retreat." *Id.* Even though, at the point he was on the ground all he had seen was his wife had been shoved and a crowd of people were coming toward him, "[b]ecause the evidence adduced at trial is susceptible to more than one interpretation, it was for the jury to decide whether Sullivan was the initial aggressor and whether he knew that he and his wife could have retreated from the encounter in complete safety." *Id.* The court noted "[u]ndoubtedly, the evidence in this case is such that a jury could also conclude that

Sullivan's honestly held beliefs regarding the use of and need for deadly force were objectively unreasonable" but "[s]uch a possibility, however, is not fatal to Sullivan's claim of self-defense" nor his requested instruction. *Id.*, at 118.

In *Hudson* the defendant had been convicted of aggravated assault against a correctional officer for fighting with a guard who had entered his cell. The evidence at trial showed that the officer handcuffed the defendant through the door to the cell in preparation for a shower. The defendant somehow got his hands in front of him and hit the guard in the face when the door opened, and then pulled the guard into the cell. *Hudson v. State*, 956 S.W.2d 103, 104. Eventually the defendant was subdued and both he and the guard were taken to the prison clinic where defendant was treated for more serious injuries than those suffered by the guard. *Hudson*, 956 S.W.2d 103, 104. At trial the trial court refused to instruct the jury on self-defense and that denial was raised on appeal. The Texas Court of Appeals affirmed the decision, while noting that "[w]hen properly requested, a defendant is entitled to a charge on every defensive theory raised by the evidence, regardless of the strength of the evidence or whether it is controverted", because defendant offered no evidence of his state of mind necessary to raise the self-defense issue. *Hudson*, at 104-05. There was no evidence that defendant was afraid of the victim, or that he reasonably believed he was in danger. "There is no evidence that [the victim], by either words or acts, caused Appellant to reasonably believe force was immediately necessary to defend himself" so the self-defense theory was not raised by any evidence and the defendant was not entitled to an instruction. *Id.* The self-defense theory requires more than the assertion that the conduct was done is self-defense, it

requires evidence that could possibly support the elements of self-defense. Because the defendant presented no such evidence, an instruction on the theory was not required.

In *Jones* the defendant was charged with attempted aggravated criminal sexual abuse after he was alleged to have disrobed in the presence of a 16 year old and solicited a sexual act. At trial the victim testified to the sequence of events and then the defense called an officer, who had interviewed the victim, who testified that the victim had described the events differently. *Jones*, 676 N.E.2d 646, 6470-48. However, both stories from the victim would have constituted the elements of the offense. The defendant requested the jury be instructed on the affirmative defense wherein he would be acquitted if he reasonably believed the victim to be 17 years of age or older. The trial court denied the requested instruction and the Illinois Court of Appeals affirmed stating that the record did not contain evidence that "raised the issue of the affirmative defense so as to require the trial judge to instruct the jury in this regard." *Jones*, 676 N.E.2d 646, 648 (*citing People v. Jones*, 276 Ill. App.3d 1006, 1009). But the Illinois Supreme Court reversed because "[a] defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence" and even "[v]ery slight evidence upon a given theory of a case will justify the giving of an instruction." *Jones*, 676 N.E.2d 646, 649 (internal citations omitted). The supreme court continued, citing the dissent in the court of appeals decision, "'[i]n deciding whether to instruct on a certain theory, the court's role is to determine whether there is some evidence supporting that theory; it is not the court's role to weigh the evidence.'" *Id.*

The evidence the Illinois Supreme Court found to be sufficient to raise the affirmative defense was as follows: at the time of the offense the victim was 16 years and 10 months old (it is not clear how that evidence was presented to the jury), the defendant did not know the victim prior to the incident, the victim was consuming alcohol at the time of the event, the victim was apparently free to stay the night at his friend's apartment, and the jury saw the victim testify "and was able to observe his appearance and demeanor so as to determine whether there was a reasonable doubt that defendant believed [the victim] to be 17 years old." *Jones*, at 649. It doesn't appear that the defendant testified he believed the victim was at least 17 years old. The court concluded, "[u]ltimately, it was for the jury to determine whether defendant had a reasonable belief that the victim had attained the age of 17 years. Absent defendant's tendered instruction, the jury lacked the necessary tools to analyze the evidence fully and to reach a verdict based on those facts." *Id.*, at 650.

Several key rules can be taken from these cases. First, a defendant is entitled to an instruction upon his theory of the case, including justification defenses, when some evidence has been presented, either by the State or the defense, to the jury that would support a reasonable basis upon which the theory could be based. Second, the court need not be convinced of the validity of the defense in order to instruct jury on it. The court should not weigh the evidence or assess its credibility in its decision whether or not to instruct the jury on the theory. Finally, when considering whether or not there is some evidence to support the theory, the court should view the evidence presented in the light

most favorable to the defendant and the requirements for the inclusion of the instruction should be construed liberally.

Application

It appears the error the majority of the court of appeals made was that it decided, taking all the evidence together, that the threat to the third person was not imminent, and that therefore, Berriel was not entitled to the jury instruction on the theory that his action was justified to protect Rachel. The majority concluded, "under the circumstances at the time he assaulted Luis with a knife, a jury could not reasonably have concluded that the nature or immediacy of the danger to Rachel reasonably justified a belief that it was probable that Luis was about to use 'unlawful force' against her." *Berriel*, at ¶ 6. The decision therefore that that evidence presented could not have justified a reasonable belief that Rachel was in danger of an imminent threat. The question for this Court to decide is whether there was a reasonable basis upon which the jury could have found a reasonable doubt that Berriel did not act in defense of a third person, given the evidence presented at trial, considered in the light most favorable to Berriel.

The majority of the court of appeals cites the Second Circuit case of *Harris v. Scully*, as an example of a defense of a third person claim where an instruction was not necessary because the jury could not have reasonably found that the victim posed a present or imminent threat to the third person. *Berriel*, 2011 UT App 317, ¶ 5. However, the facts in *Harris* are distinguishable from the facts in this case and the distinctions between the two cases actually demonstrate why the defense instruction should have been given in this case. In *Harris* the defendant was convicted of killing his brother and on

appeal he claimed "that the jury should have been permitted to determine whether he reasonably believed that... his mother and his brother, Alonzo, were in danger from [his brother] John's imminent use of deadly physical force." *Harris v. Scully*, 779 F.2d 875, 878. On the afternoon of the killing the victim, John, was intoxicated and began arguing with his mother, he threw her on the bed, refused to leave, and tore the phone from the wall. *Harris*, 779 P.2d 875, 877. The defendant heard the dispute and tried to intervene by calling the police. When the police arrived they refused to arrest the victim, but they did order him to leave. The victim soon returned and began fighting with the defendant and his brother, Alonzo, which ultimately resulted in the defendant stabbing and killing the victim. On appeal the court found that there was no version of the events that would show "at the time of the killing, John [the victim] was using or was about to use deadly physical force against any other family member" and thus the defense of others was not supported. *Id.*, at 879.

The facts in this case are quite different. Here the factors supporting a finding of imminence were present from Berriel's perspective at the time he acted to defend Rachel. He knew about Luis' violent character and his history of violence toward Rachel, and she had called for help, when Berriel encountered Rachel she was still in Luis' presence and Luis told Berriel to "stay out of it", and then confrontation immediately occurred. Nothing that would have led Berriel to believe Rachel was no longer in imminent danger came between the call for help and the use of force. In contrast, in *Harris* the victim fought with the mother then left, then showed up again and fought with the brother Alonzo, which ended, and then fought with the defendant. Then, after the fighting with

the defendant for some time the defendant began stabbing the victim. The stabbing was the use of force the defendant claimed was justified, not the fighting. The record "indicates that at the time of the stabbing [the defendant] alone was struggling with John..." *Id.* In other words, at the time the defendant used the force he sought to justify he already knew the third person was not in danger because he had already come between the victim and the third person. Here the record indicates that the threat to Rachel's safety was not separated from the use of force by anything that would let Berriel reasonably believe that she was no longer in danger of imminent harm. Unlike *Harris* where the defendant knew third persons were no longer in danger because the use of force (the stabbing) was done only after the victim had been separated from the third persons and the fight was only between the defendant and the victim.

The majority also cited the Kansas case of *State v. Hernandez*, which is clearly distinguishable from the facts in this case as well and again illustrate why the court of appeals and the trial court in this case were wrong. *Berriel*, 2011 UT App 317, ¶ 5. In *Hernandez* the defendant had been made aware of threats and threatening behavior of the victim toward the defendant's sister. Each of them, the sister, the victim and the defendant, worked at the same location. Evidence showed the defendant was aware of a threat the victim had made to kill the sister at 11:00. On the morning of the shooting the defendant armed himself with a gun, approached the victim, "and invited him outside to talk." *Hernandez*, 861 P.2d 814, 817. The defendant confronted the victim about a domestic situation with his sister (the victim's estranged wife) and they began arguing. *Id.* The defendant testified he pulled out a gun after the victim leaned toward the

defendant and shot the victim "'to stop him, slow him down... I thought maybe he was gonna take me down and them go in after my sister.'" *Id.* After the first shot the victim said "'Now, I'm gonna kill you too,'" which the defendant said he interpreted as a threat against himself and his sister. *Id.*, at 818. The second, third and fourth shots were fired because the victim began to run and the defendant said he believed the victim was going into the building after his sister. *Id.*[5]

The Kansas Supreme Court upheld the trial court's refusal to instruct the jury on defense of another after it examined two questions: "[d]id Hernandez sincerely believe it was necessary to kill [the victim] in order to defend [the sister]" and "[w]as his belief reasonable?" *Id.*, at 819. The defendant argued that his actions were in response to an imminent threat because the victim had threatened to kill his sister. However, the court found that the term imminent must have some limit and the court found that the threat, to kill her at 11:00 a.m., given the fact that she was not present at the time of the shooting, did not create an imminent danger. *Id.*, at 820.

The circumstances presented to the trial court in this case are clearly different. Although the defendant in *Hernandez* was made aware of other prior acts of threats and violence similar to information Berriel was aware of, the significant difference between these cases are what immediately led to the confrontation and what the circumstances were at the time force was used. In *Hernandez* the defendant had been preparing to

[5] There is no evidence in the opinion whether or not evidence was presented as to the location of the sister at the time of the shooting, other than to say she was not at the scene.

confront the victim for days and weeks before the incident, he warned others of his intent to harm the victim, he showed others the gun, and on the day of the shooting he calmly asked the victim to talk, knowing fully that the sister was not in the area. *Hernandez*, at 816-17. In this case the evidence showed Rachel called Berriel 'shortly' before the incident, she is crying and asking for help, and Berriel immediately begins trying to find them to protect her. As soon as Berriel finds Rachel, he discovers she is in Luis' presence and the confrontation occurs before anything changes his understanding of the threat.

Unlike *Hernandez*, here there is no prior planning, there is no calm attempt to talk, and Rachel was in the presence of Luis from the time of the call until the time of the confrontation. Although the majority believes that the time between the call and the confrontation made the threat less than imminent, there is nothing that Berriel was aware of that lessened the imminence of the threat to Rachel. See *Berriel*, fn. 2 (Thorne, dissent). As pointed out by Judge Thorne in dissent, "once Berriel had a reasonable basis to believe that Rachel was in imminent danger... his actions in her defense were potentially justifiable... until such time as Berriel had reason to believe that the danger to Rachel had passed. *Berriel*, 2011 UT App 317 ,¶ 23. Because Berriel acted immediately to protect Rachel after she called crying for help, because the use of force came shortly after the call, and because Rachel was still in Luis's presence when Berriel found them and Luis made it known that he did not want Berriel to intervene, the facts in this case are clearly distinguishable from those in *Hernandez* and those distinctions demonstrate why the defense of a third party should have been allowed in this case.

The majority opinion also cites *State v. Brown* as an example of an appropriately denied request for a self-defense instruction. *Berriel*, at ¶ 5. But the facts in this case are also distinguishable from those in *Brown* as well. In *Brown* the defendant was convicted of first degree murder for killing a man who was set to testify as a witness against the defendant in an unrelated murder case. *Brown*, 607 P.2d 261, 262. On appeal the defendant claimed the trial court "erred in refusing to give [self defense] instructions." *Brown*, at 265. The evidence presented at trial in support of self-defense was as follows. The defendant had taken the victim to a trailer in a wilderness area to hide until the trial was over. *Id.*, at 262. The defendant testified "he was inside the trailer when he saw [the victim] pick up a club." *Id.*, at 266. He said he was apprehensive that the victim would try to harm him. *Id.*, at 264. The defendant then testified that the victim did not say anything but that he went out and shot at the victim who then began to run away. *Id.*, at 266. The Utah Supreme Court found there was "no evidence capable of raising a reasonable doubt in the jury's mind as to whether the defendant acted in self defense" and that the instructions on self defense were properly refused. *Id.* Rather "the evidence unmistakably shows instead that defendant was the aggressor." *Id.*

Unlike the facts in *Brown*, where the defendant did not present any facts of imminence or reasonableness upon which the jury could have considered the justification, here Berriel did present such evidence. In *Brown* at the moment when the victim was observed with the club (the moment the defendant became aware of the possible threat) the victim was outside the trailer and the defendant was not in danger, and there was not any evidence presented a threat prior to that moment. Furthermore, the defendant

testified that the victim did not threaten to use the club even while he was holding it. There was nothing in evidence to support the theory that the defendant reasonably believed he needed to protect himself, only that the victim picked up a stick and it made the defendant apprehensive. Here, according to the evidence, Luis was not only threatening to harm Rachel but was in fact abusing her while she was calling.[6] When Berriel received the phone call he believed Rachel was in Luis' presence and continued to be in his presence up until the time Berriel confronted Luis. In *Brown* when the defendant approached the victim, supposedly to defend himself, the victim turned and ran only to be shot in the back as he tried to escape. Here, when Berriel confronted Luis to defend Rachel, Luis told Berriel "You don't know what's going on, stay out of it" and continued toward Berriel. R. 144: 266. This statement gave Berriel further reason to believe that something was still going on, the very thing for which Rachel had very recently been crying for help, and Luis' movements toward Berriel prevented him from finding out any more information. The majority's reference to *Brown* is unpersuasive because the facts are so very different. There the defendant's conduct in no conceivable way supported a self-defense claim. Yet here, while perhaps not conclusive of imminence, the facts at least support a reasonable basis upon which a jury could have found a reasonable doubt in the State's duty to prove that the threat was not imminent. There was clearly "some evidence" of the defense of another and Berriel should have been allowed to instruct the jury. *State v. Knoll*, 712 P.2d 211, 215 (Utah 1985).

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[6] Scott Carlisle testified Rachel's screams on the phone made him think she was being hit right then.

Just like *Garcia* and *Knoll* where the evidence of the justification defense conflicted with the other evidence, there was certainly some evidence presented to support the justification defense and because of that the court is obligated by the statute and by the due process clause to allow the defendant to present his theory to the jury. Unlike *Castillo* and *Brown* where the defendants testified they did not recall the events surrounding their use of force and yet requested a self-defense instruction, Berriel's theory here clearly demonstrates the belief he had that confronting Luis with force was necessary. Evidence was presented that Luis had repeatedly abused Rachel, that she had repeatedly sought help and that just before the confrontation she again called Berriel frantically pleading for him to intercede. Berriel was not asking the jury to invent the circumstance that would justify his conduct; he was asking the jury to consider whether the circumstances presented justified his conduct.

The court of appeals' holding accepts the fact that at the time the phone call was made there was *some evidence* that Berriel had reason to believe Rachel was under an imminent threat of harm. *Berriel*, at ¶ 6 ("there was some evidence that Berriel had information that led him to believe Luis had been violent toward Rachel in the past, even the very recent past..."). The crucial fact to the majority was that "at least fifteen minutes had passed from the time of her call and there was no evidence that Rachel was in imminent danger at the time Berriel attacked Luis." *Berriel*, at ¶ 5. However, as pointed out by Judge Thorne's dissent, this fifteen minutes is presumed by the majority based on other testimony, but is certainly not required by the evidence. In a footnote the majority claims that Luis "testified that the only phone available to Rachel was their

home phone. We therefore can infer that at least fifteen minutes passed between the phone call and the altercation. We have no information, however, as to precisely how much time had passed." *Berriel*, at fn. 2.

It seems the majority relied upon Luis' testimony in answer to the question from defense counsel "Does Rachel have a phone?" to which the witness replied, "House phone." R. 143: 117. Presumably the majority the court of appeals is interpreting the witness's answer to mean 'she only has a house phone and not a cell phone and she does not have access to any cell phones'; however, that much meaning is not conveyed by the question or the answer. Rather, in context, it seems likely that Luis actually believed defense counsel's question was referring specifically to the house phone because a significant portion of his testimony, and the questions just prior to this question, were aimed directly at other prior phone calls that were clearly made to the house phone. Petitioner can find no other evidence on the record supporting the majority's conclusion that Rachel had no access to a cell phone or that the distressed phone call necessarily came from the home phone prior to the trip to pick up her brother, and that therefore the call necessarily took place "at least fifteen minutes" prior to the confrontation. *Berriel*, at ¶ 5; see R. 143: 89 (Luis's testimony about the earlier calls from Berriel to the house phone); R. 143: 91-92 (same); R. 143: 95 (same); R. 143: 98 (same); R. 143: 117 (same).

The majority was right about one thing, there was no information as to precisely how much time passed from the phone call to the confrontation, however, evidence was presented to show that it was not a long time. Judge Thorne seemed to agree with this position in his dissent when he noted that "Rachel did not testify as to exactly when or

from where she called Berriel, and in the absence of clear testimony as to the timing of the phone call, I believe that the jury could reasonably have concluded that the interval may well have been somewhat less than fifteen minutes." *Berriel*, at fn. 2 (Thorne, dissent). As noted in Judge Thorne's dissent, based on the evidence in the record and the nearly universality of cellular telephones, the majority's conclusion that the call must have been from the home phone and therefore must have been at least fifteen minutes before the confrontation is not reasonable.

Furthermore, even assuming the call took place from the house phone prior to Luis and Rachel leaving, although Rachel's testimony was that the trip took about 15 minutes, other witnesses testified that Berriel left for Rachel's house immediately after the call ended. Isaac testified that Rachel called and "was crying 'cause her boyfriend was hitting her…" so when Berriel got the call, he turned the car around and drove the other way. R. 144: 249. Scott saw Rachel's name on the caller ID of Berriel's phone, he said when Berriel was done with the call Berriel said "[h]e was going down to this girl's house 'cause she was getting beat up…" so the next thing was they "went over there." R. 144: 255-56. She was "screaming and crying on the phone" so that's when they "turned and went to her house." R. 144: 260. Rachel herself testified that she "really didn't know" how far of a drive it was (R. 143: 139) and that she didn't have a good memory about the events (R. 143: 203). Luis' statement at the time he exited the car also established that he knew what it was about and was not surprised that Berriel showed up to confront him.

With all this testimony the jury could have reasonably believed that the interval between the call and the confrontation was a very short time. The majority's strict

adherence to fifteen minutes is neither required by the evidence nor consistent with the principle that the facts should be considered in the light most favorable to the defense.

Finally, even if this Court feels constrained by the record to find that the call for help was at least fifteen minutes prior to the confrontation, which Berriel believes is not warranted, there is still no need to find as the court of appeals did that there was no reasonable basis to support the defense of a third person instruction. The State has argued, and the court of appeals agreed, that if Berriel were allowed to have his instruction where he used force at any time other than a moment when Rachel was being abused, then instances of retaliation (Appellee's Brief at 28) and vigilantism would gain the protection of law (*Berriel*, at ¶ 6). The majority and the State seem to suggest that if the call for help and the use of force were separated by 15 minutes then the use of force is necessarily retaliation rather than protection and a defendant must not be allowed to present such a theory, but this supposed threat to the statute is unfounded. The jury is still required to find the defendant "reasonably believes that the force is necessary to defend... a third person against such other's imminent use of unlawful force." UTAH CODE § 76-2-402(1). The jury would still have to consider the reasonableness and imminence based on the evidence and the factors set forth in subsection (5). The State seems to suggest that the jury would not be able to consider whether or not the threat was imminent if the facts do not clearly show that the harm to the third person was occurring immediately as the decision to use force is made. That position is incorrect.

Judge Thorne's dissent makes this flaw manifest. He wrote "[i]n my view, once Berriel had a reasonable basis to believe that Rachel was in imminent danger due to her

phone call, his actions in her defense were potentially justifiable under Utah Code section 76-2-402 *until* such time as Berriel had reason to believe that the danger to Rachel had passed." *Berriel*, ¶ 23 (Thorne, dissent). Thorne acknowledged that at some point "the mere passage of time could... give reason to infer that a particular threat has ended. However, the potentially quite short period of time between Rachel's phone call and the ultimate altercation in this case does not give rise to such an inference." *Berriel*, fn. 3 (Thorne, dissent). This point is critical here, unlike *Hernandez* where the defendant planned the use of force for weeks, separated the victim from the third person, began by calmly discussing the matter and then decided to shoot victim outside the third person's presence; here we are talking about a matter of minutes and Rachel is in Luis' presence the entire time, and from Berriel's perspective, nothing has changed when he confronts Luis.

While it is true, the jury could have looked at the facts emphasized by the court of appeals, the fact that Luis was not apparently harming or threatening Rachel at the moment Luis exited the vehicle and ran toward Berriel, and found the threat was not imminent. The jury could have found based on the evidence that the interval was at least 15 minutes and believed 15 minutes makes the threat no longer imminent, or the jury could have believed that there never was a threat or a phone call for help and the confrontation stemmed from the earlier disagreements between Berriel and Luis. However, the jury could also have focused on the facts presented by the defense, that Rachel repeatedly lied in order to cover for Luis' violence, that she was hysterical on the phone within minutes of the confrontation, that at the time of the confrontation Luis

seemed to try to prevent Berriel from finding out what was "going on", and the jury could have found the threat was ongoing and Berriel's conduct was reasonable to defend Rachel. That is the very point of the statute, the trier of fact should consider the facts and decide about imminence and reasonableness. The very fact that this weighing of facts can take place is the exact reason the issue should have gone to the jury. The simple truth is that the jury heard evidence upon which it could have found the conduct was justified (or at least a reasonable doubt in the State's burden to show it was not justified) and therefore both the trial court and the majority of the court of appeals erred in concluding otherwise.

CONCLUSION AND PRECISE RELIEF SOUGHT

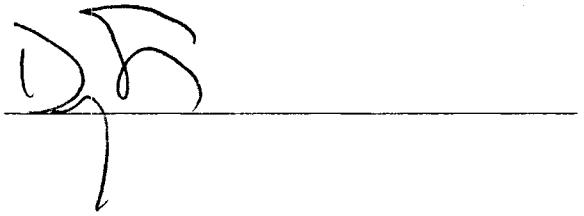
In conclusion, the decision of the majority of the Utah Court of Appeals affirming the trial court's refusal to instruct the jury on defense of a third person was an error because there was some evidence presented to support the defense theory. It is not unreasonable that the jury, based on the evidence, could have found a reasonable doubt that Berriel's conduct was not justified. Because of that possibility, the trial court and the Court of Appeals committed error and this Court should conclude "Berriel was entitled to his requested instruction on the defense of others" and should vacate the conviction and remand this case for a new trial. *Berriel*, at ¶ 28 (Thorne, dissent).

RESPECTFULLY SUBMITTED this 21ST day of FEBRUARY, 2012.

Douglas J. Thompson
Attorney for Petitioner/Defendant

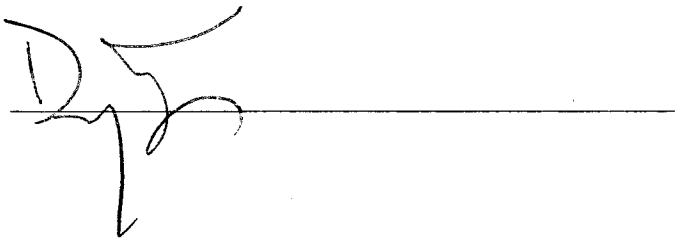
CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing Brief of Petitioner/Defendant postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 21st day of February, 2012.



Certificate of Compliance

I hereby certify that above brief complies with Rule 24(f)(1) by containing no more than 14,000 words (excluding the table of contents, table of citations, and any addendum). According to the word-count function on counsel's word processing program, this brief contains 13,114 words.



76-2-402. Force in defense of person -- Forcible felony defined.

(1) (a) A person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force.

(b) A person is justified in using force intended or likely to cause death or serious bodily injury only if the person reasonably believes that force is necessary to prevent death or serious bodily injury to the person or a third person as a result of another person's imminent use of unlawful force, or to prevent the commission of a forcible felony.

(2) (a) A person is not justified in using force under the circumstances specified in Subsection (1) if the person:

(i) initially provokes the use of force against the person with the intent to use force as an excuse to inflict bodily harm upon the assailant;

(ii) is attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or

(iii) was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates to the other person his intent to do so and, notwithstanding, the other person continues or threatens to continue the use of unlawful force.

(b) For purposes of Subsection (2)(a)(iii) the following do not, by themselves, constitute "combat by agreement":

(i) voluntarily entering into or remaining in an ongoing relationship; or

(ii) entering or remaining in a place where one has a legal right to be.

(3) A person does not have a duty to retreat from the force or threatened force described in Subsection (1) in a place where that person has lawfully entered or remained, except as provided in Subsection (2)(a)(iii).

(4) (a) For purposes of this section, a forcible felony includes aggravated assault, mayhem, aggravated murder, murder, manslaughter, kidnapping, and aggravated kidnapping, rape, forcible sodomy, rape of a child, object rape, object rape of a child, sexual abuse of a child, aggravated sexual abuse of a child, and aggravated sexual assault as defined in Title 76, Chapter 5, Offenses Against the Person, and arson, robbery, and burglary as defined in Title 76, Chapter 6, Offenses Against Property.

(b) Any other felony offense which involves the use of force or violence against a person so as to create a substantial danger of death or serious bodily injury also constitutes a forcible felony.

(c) Burglary of a vehicle, defined in Section **76-6-204**, does not constitute a forcible felony except when the vehicle is occupied at the time unlawful entry is made or attempted.

(5) In determining imminence or reasonableness under Subsection (1), the trier of fact may consider, but is not limited to, any of the following factors:

(a) the nature of the danger;

(b) the immediacy of the danger;

(c) the probability that the unlawful force would result in death or serious bodily injury;

(d) the other's prior violent acts or violent propensities; and

(e) any patterns of abuse or violence in the parties' relationship.

Amended by Chapter 324, 2010 General Session

Amended by Chapter 361, 2010 General Session

76-5-103. Aggravated assault.

(1) A person commits aggravated assault if the person commits assault as defined in Section **76-5-102** and uses:

(a) a dangerous weapon as defined in Section **76-1-601**; or

(b) other means or force likely to produce death or serious bodily injury.

(2) (a) A violation of Subsection (1) is a third degree felony, except under Subsection (2)(b).

(b) A violation of Subsection (1) that results in serious bodily injury is a second degree felony.

Amended by Chapter 193, 2010 General Session

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellee, v. Darren Berriel, Defendant and Appellant.	)	MEMORANDUM DECISION Case No. 20090665-CA FILED (September 15, 2011) 2011 UT App 317

Fourth District, Provo Department, 081402953
The Honorable Gary D. Stott

Attorneys: Margaret P. Lindsay and Douglas J. Thompson, Provo, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake City, for Appellee

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Before Judges Davis, Thorne, and Roth.

ROTH, Judge:

¶1 Darren Berriel appeals his convictions for aggravated assault, a third degree felony, *see* Utah Code Ann. § 76-5-103(1)(b), (3) (2008) (current version at *id.* § 76-5-103(1)(a), (2)(a) (Supp. 2011)), and possession of a deadly weapon with intent to assault, a class A misdemeanor, *see id.* § 76-10-507 (2008). First, he argues that the trial court erred in refusing to instruct the jury on justification for the use of force in defense of another as a defense to the aggravated assault charge. Second, he contends that the trial court erroneously denied his motion to merge the weapon possession conviction with the aggravated assault conviction. We affirm the trial court's decision to deny the

requested instruction but vacate the conviction for possession of a deadly weapon with intent to assault.

¶2 Berriel was charged with stabbing the victim, Luis, with a knife and with possession of the knife with the intent to commit the assault. Approximately three weeks before the incident from which these charges arose, Berriel's friend, Rachel, confided in him that Luis, her boyfriend, was physically abusing her.[1] When Rachel called Berriel on September 23, 2008, for help, she was screaming and crying that Luis was beating her. Berriel, who had been driving a group of friends to the movies, immediately drove to Rachel and Luis's house. On the way, he called one of Rachel's friends to have her remove Rachel from the scene. When Berriel arrived, however, neither Luis nor Rachel were home. Berriel and his friends waited in the car for them to return.

¶3 In the meantime, Luis and Rachel had gone to pick up Rachel's younger brother. Rachel testified that the entire trip took fifteen to twenty minutes.[2] When they returned to the house, Luis was driving, while Rachel was in the passenger seat and her brother was in the back seat. As the three exited the car, there was no indication of an ongoing argument, nor did any of them appear to be upset. Berriel immediately ran at Luis with a knife.[3] As Berriel approached, Luis told him, "[Y]ou don't need that knife to fight

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1. Rachel testified that she had told Berriel that Luis hits her. Others testified that they had witnessed other acts of abuse, including Luis pushing Rachel into a car door, causing her to hit her head and leaving a scar on it, and throwing her across a room. It is not apparent from the record that Berriel was aware of these acts.

2. Luis testified that the only phone available to Rachel was their home phone. We therefore can infer that at least fifteen minutes passed between the phone call and the altercation. We have no information, however, as to precisely how much time had passed.

3. There was testimony from one witness that Berriel had begun to run toward Luis's car even before it stopped. Another witness, however, indicated that it was Luis who actually ran at Berriel. Because of this testimony, the trial court granted Berriel's request to instruct the jury on self-defense. Except where this conflict is relevant to the

(continued...)

with me." A brief physical encounter ensued, during which Berriel thrust his knife toward Luis's stomach. Luis dropped his arms to protect his abdomen, and the knife caught him in the left forearm. Luis then ran to get his dog from the backyard, and Berriel and his friends fled. Although Luis pursued Berriel and his friends by car, he never caught up with them. Luis later went to the hospital to have his arm stitched. During the encounter, Rachel was somewhere between fifteen feet and fifteen yards away from the altercation.[4]

¶4 Berriel's first claim of error is that the trial court refused to instruct the jury on his defense that the attack on Luis was justified by the need to defend another person, Rachel. *See* Utah Code Ann. § 76-2-402(1) (2008) ("A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force.") (current version at *id.* § 76-2-402(1)(a) (Supp. 2011)). We review the trial court's denial of a requested jury instruction as a question of law for correctness. *See State v. Gallegos*, 2009 UT 42, ¶ 10, 220 P.3d 136. In an analogous situation, the Utah Supreme Court addressed the circumstances that entitle a defendant to a jury instruction on self-defense, which is codified, along with defense of another, in Utah Code section 76-2-402(1) as a justification defense:

> "If the defendant's evidence, although in material conflict with the State's proof, be such that the jury may entertain a reasonable doubt as to whether or not he acted in self-

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3. (...continued)
resolution of an issue on appeal, we accept the facts in favor of the jury's verdict. *See generally State v. Jeffs*, 2010 UT 49, ¶ 3, 243 P.3d 1250 ("On appeal, we review the record facts in a light most favorable to the jury's verdict." (internal quotation marks omitted)).

4. Rachel testified that she was near a light post away from the altercation, though she did not give a distance. Luis estimated that the light post was fifteen to twenty feet from him and Berriel. Rachel's friend corroborated that Rachel was not near the encounter. Rachel's brother testified that he too was near the light post, which he estimated was fifteen yards from Luis and Berriel. He later clarified that he was no more than the distance between the witness stand and the podium in the courtroom, a distance not specified in the record.

> defense, he is entitled to have the jury instructed fully and clearly on the law of self-defense. Conversely, if all reasonable men must conclude that the evidence is so slight as to be incapable of raising a reasonable doubt in the jury's mind as to whether a defendant accused of a crime acted in self-defense, tendered instructions thereon are properly refused."

State v. Maestas, 564 P.2d 1386, 1390 (Utah 1977) (quoting *State v. Castillo*, 23 Utah 2d 70, 457 P.2d 618, 620 (1969)); *see also State v. Garcia*, 2001 UT App 19, ¶ 8, 18 P.3d 1123 (observing that it is the defendant's burden to "provide some reasonable basis for the jury to conclude" that the action was justified, though the evidence may be presented by either the prosecution or the defense (emphasis omitted)).

¶5 The trial court decided there was a sufficient basis for a self-defense instruction in this case because one witness testified that Luis first ran at Berriel. Unlike the self-defense claim, however, there is no evidence capable of creating a reasonable doubt that Berriel may have been acting in defense of Rachel.[5] According to the undisputed testimony, when Rachel and Luis arrived at their residence, at least fifteen minutes after Rachel had called Berriel and told him that Luis was assaulting her, they did not appear even to be arguing. There was no evidence that Luis, during the time he could have been observed by Berriel, had threatened, touched, harmed, or even approached Rachel in any way, nor had he exhibited any weapons. In fact, from the point at which he emerged from the car, Luis's attention was directed entirely at Berriel, who was coming at him with a knife.[6] Moreover, during Luis's encounter with Berriel, Rachel was at least fifteen feet away and out of the path of the confrontation. On these facts, a jury

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5. Some of the factors that are relevant to whether the threat of unlawful force is imminent and whether the defendant's actions are reasonable are "the nature of the danger," "the immediacy of the danger," "the probability that the unlawful force would result in death or serious bodily injury," "the other's prior violent acts or violent propensities," and "the patterns of abuse or violence in the parties' relationship." Utah Code Ann. § 76-2-402(5) (2008) (current version at *id.* (Supp. 2011)).

6. While there was a conflict in the evidence as to whether Luis or Berriel was the *first* to run toward the other, there was no dispute that Berriel ran toward Luis with a knife in his hand.

could not reasonably have concluded that Luis posed a present or imminent threat of unlawful force to Rachel. *See generally Harris v. Scully*, 779 F.2d 875, 879 (2d Cir. 1985) (affirming the denial of an instruction on defense of a third person in a murder trial because there was no version of the events in which the jury could have believed that the deceased was about to use deadly force against the defendant's mother or brother when the deceased had just left the home where the mother was located and the brother had broken free from the fistfight); *State v. Hernandez*, 861 P.2d 814, 820 (Kan. 1993) (upholding the trial court's decision to deny an instruction on defense of another where the person allegedly defended was not present during the fight that led to the fatal gunshots because implied threats and a "history of violence [between the deceased and the third person] could not turn the killing into a situation of imminent danger"); *State v. Brown*, 607 P.2d 261, 266 (Utah 1980) (affirming the denial of justification instructions where the only evidence to support the defendant's theory of self-defense was that the deceased had implicitly threatened him with a club while the defendant was still inside the house and the deceased remained outside). The fact that Berriel may have believed that Rachel was in danger when she called because she was screaming and crying for help and Berriel was aware that Luis had previously physically abused her likewise does not constitute a sufficient basis for a defense-of-another instruction where at least fifteen minutes had passed from the time of her call and there was no evidence that Rachel was in imminent danger at the time Berriel attacked Luis. *See State v. Starks*, 627 P.2d 88, 91 (Utah 1981) (stating that "[t]he right to [justification defenses] ceases when the danger has passed or ceases to be imminent").

¶6 Thus, while there was some evidence that Berriel had information that led him to believe Luis had been violent toward Rachel in the past, even the very recent past, under the circumstances at the time he assaulted Luis with a knife, a jury could not reasonably have concluded that the nature or immediacy of the danger to Rachel reasonably justified a belief that it was probable that Luis was about to use "unlawful force" against her. And it is the imminence of harm to another that is central to the legal justification of violence to prevent it; otherwise, this humane law of justification could be extended to countenance retribution or vigilantism. *See generally* Utah Code Ann. § 76-2-402. Therefore, we affirm the trial court's decision not to instruct the jury on defense of another as a justification for Berriel's conduct.

¶7 We turn now to Berriel's contention that the possession of a deadly weapon with intent to assault conviction should have merged[7] with the aggravated assault conviction.[8] Pursuant to Utah Code section 76-1-402,

> [a] defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

Utah Code Ann. § 76-1-402(1) (2008). Specifically, "[a] defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense." *Id.* § 76-1-402(3). We review whether a crime is a lesser included offense of another as a question of law for correctness. *See State v. Chukes*, 2003 UT App 155, ¶ 9, 71 P.3d 624.

¶8 To determine whether one offense is included within another, we apply a two-phase test. *See State v. Ross*, 951 P.2d 236, 241 (Utah Ct. App. 1997) (citing *State v. Hill*, 674 P.2d 96, 97 (Utah 1983)). First, we compare the statutory elements to determine if

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7. Although Berriel refers to this claim as a merger issue, he frames the issue as one that involves both the merger and the lesser included offense doctrines. We agree that, under the facts presented to the jury in this case, possession of a deadly weapon with intent to assault is a lesser included offense of aggravated assault and do not address whether the merger doctrine, as described in a series of kidnaping cases cited by Berriel, provides a separate basis for reversing the conviction.

8. The State argues that this issue is not preserved because Berriel raised it following the State's case-in-chief and did not renew it after the jury rendered its verdict. According to our case law, however, a merger or lesser included offense argument is preserved if it is raised "at any time, either during trial, or following the conviction on a motion to vacate." *State v. Lopez*, 2004 UT App 410, ¶ 7, 103 P.3d 153 (internal quotation marks omitted).

the lesser offense is proven by the same or less than all the elements required to prove the greater offense, that is, whether the crimes are "such that the greater cannot be committed without necessarily having committed the lesser." *See id.* (internal quotation marks omitted). If either of the crimes have multiple variations, as in this case, we must also "consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial." *See id.* (internal quotation marks omitted).

¶9 Two of our prior cases provide useful guidance in applying this test. In *State v. Ross*, 951 P.2d 236 (Utah Ct. App. 1997), the defendant was involved in a forged check cashing scheme, in which he and a male accomplice would pick up a female accomplice to whom they would provide false identification and a forged check. *See id.* at 237-38. The woman would then cash the check while the men waited in the car; she then returned the cash to the male accomplice, who divided it between them. *See id.* During the three-week scheme, they cashed, in this manner, thirty-five to forty checks, each worth $300 to $700. *See id.* The defendant was convicted of forgery and communications fraud, and he appealed, arguing that the forgery offense was included within communications fraud. *See id.* at 237-38, 241 & n.6. To be guilty of communications fraud, one must "devise[] any scheme or artifice to defraud another" of "property, money, or [other] thing" worth at least $5000 and must "communicate[] directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice." *See id.* at 241-42 (internal quotation marks omitted). Forgery requires a person to "make[], complete[], execute[], authenticate[], issue[], transfer[], publish[], or utter[]" a "check with a face amount of $100 or more" with the "purpose to defraud" or "knowledge that he is facilitating a fraud." *See id.* at 242 (internal quotation marks omitted).

¶10 After comparing the elements, we determined that under at least one variation of the offenses, forgery was a lesser included offense of communications fraud. *See id.* Under that variation, a defendant would have to have devised a scheme that involved uttering or transferring forged checks of at least $100 and "communicated with another person for the purpose of executing the [fraudulent] scheme by uttering or transferring a forged check worth at least $100" with the goal of obtaining at least $5000 total. *See id.* We thus considered whether, under the specific variations of the crimes presented and proven at trial, forgery was an included offense. *See id.* The State conceded that it had told the jury that it could find that both a "communication" required for

communications fraud and an "utterance" required for forgery occurred when the defendant passed the check to the female accomplice. *See id.* It argued on appeal, however, that the conviction could be upheld because there was evidence in the record from which the jury could have found an independent basis for the communications fraud conviction. *See id.* We disagreed, observing that the jury instructions perpetuated the State's theory that the "communication" and the "utterance" could both be the passing of the written check because they defined "communication" as including a writing such as a check. *See id.* at 245. Moreover, the jury was never asked to find a "communication" separate from the passing of the check. *See id.* Without a separate factual basis for each conviction, we determined that forgery was a lesser included offense of communications fraud and vacated the forgery conviction. *See id.*

¶11 A similar issue arose in *State v. Chukes*, 2003 UT App 155, 71 P.3d 624, in which this court considered whether forgery was a lesser included offense of identity fraud. *See id.* ¶ 16. We agreed with the parties that some variations of identity fraud included forgery because the forgery elements of "mak[ing] or execut[ing] a writing purporting to be an existent person" "with a purpose to defraud" could fall within the scope of the "us[ing] or attempt[ing] to use [personal] information with fraudulent intent" elements of identity fraud. *See id.* ¶¶ 16-18 (internal quotation marks omitted). Thus, we examined the evidence presented at trial to determine if the convictions of each offense were based on separate factual evidence. *See id.* ¶ 19. At trial, the State did not argue to the jury that the identity fraud was accomplished by acts different from those necessary to commit forgery. *See id.* ¶ 23. Nor did the jury instructions explicitly inform the jury that the forged writings themselves could not also fulfill the "us[ing] or attempt[ing] to use [personal] information" element of identity fraud. *See id.* ¶¶ 16, 26. Thus, having determined that the "the [arguments,] instructions[,] and evidence at trial" did not inform a reasonable jury that it had to base each conviction on separate evidence, we vacated the defendant's conviction for forgery as a lesser included offense of identity fraud. *See id.* ¶¶ 22-23, 27 (alterations in original) (internal quotation marks omitted).

¶12 Using the approach employed in *Ross* and *Chukes*, we now consider whether Berriel was appropriately convicted of both aggravated assault and possession of a deadly weapon with an intent to assault. A defendant is guilty of one variation of third degree aggravated assault if he commits an assault by using a dangerous weapon. *See* Utah Code Ann. § 76-5-103(1)(b), (3) (2008) (current version at *id.* § 76-5-103(1)(a), (2)(a) (Supp. 2011)). A "[d]angerous weapon" includes "any item capable of causing death or

serious bodily injury," a definition that clearly includes most knives. *See id.* § 76-1-601(5)(a) (2008). The defendant must commit such acts intentionally, knowingly, or recklessly. *See id.* § 76-5-103 (specifying no culpable mental state for aggravated assault); *id.* § 76-2-102 (providing the culpable mental state for crimes where the definition of the offense does not specify one). A defendant is guilty of possession of a deadly weapon with intent to assault, a class A misdemeanor, if he possesses a dangerous weapon[9] with the accompanying "intent to unlawfully assault another." *See id.* § 76-10-507. A comparison of the elements of the two crimes reveals that the *possession* of a deadly weapon--the knife--which is an element of the weapon possession charge, can be proven by the same facts as the *use* of the dangerous weapon required by the aggravated assault charge because a defendant ordinarily has to possess the weapon to use it. Additionally, the "intent to unlawfully assault another" element of the weapon possession charge can be established by the same facts as the aggravated assault charge if the assault itself was intentional. Thus, we must "consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial." *See Ross*, 951 P.2d at 242 (internal quotation marks omitted).

¶13 Although aggravated assault involving the use of a dangerous weapon may be committed intentionally, knowingly, or recklessly, *see* Utah Code Ann. § 76-5-103(1)(b); *id.* § 76-2-102, the State focused its case at trial on evidence that Berriel both intended to assault Luis and intentionally did so. In particular, the State called a friend of Rachel's, who testified that Berriel had called her prior to the encounter and instructed her to get Rachel away from the house. Three of Berriel's friends also testified for the State. Their testimonies presented a picture for the jury of the events leading up to the assault: that Berriel received a call from Rachel, in which she was screaming and crying for Berriel's help and his protection from Luis; that Berriel had indicated to at least one friend that he needed to go to Rachel's house because Luis was beating her; that he immediately turned the car around and drove to Rachel's house; and that Berriel was quiet during the drive, as though he was "thinking through" his response to Rachel's request. When they arrived at Rachel and Luis's house, no one was home. As soon as Luis arrived though, which was at least fifteen minutes after Rachel's call, Berriel ran at Luis with a

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9. While section 76-10-507 describes the weapon as "deadly" in its title, the wording of the statute itself requires only that the weapon be "dangerous." *See generally* Utah Code Ann. § 76-10-507 (2008). This nominal inconsistency is not an issue on appeal.

knife. The encounter lasted only a few moments during which Berriel stabbed Luis and then fled. In the car after the assault, Berriel admitted stabbing Luis with the knife. There was no testimony that suggested that the stabbing was an accident or was recklessly inflicted. Further, the instruction the jury received regarding culpable mental state discussed only intent:

> In every crime or public offense there must be a union or joint operation of the act and the defendant's mental state to commit the act. The defendant's mental state is manifested by the circumstances connected with the offense and his sound mind and discretion.
>
> *In this case, the defendant must have acted "intentionally" or "with intent."* Under the law of the State of Utah, a person engages in conduct intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(Emphasis added.) Thus, under the facts of this case, the weapon possession conviction is a lesser included offense of the aggravated assault conviction unless the jury could have found that Berriel possessed the knife with intent to assault from evidence separate and apart from the facts of the assault itself.

¶14 The State asserts that there is such an independent basis for the weapon possession conviction. "In essence, the State [is] argu[ing] that the evidence establishes that the [possession] and [aggravated assault] convictions were separate acts," based on separate facts sufficient to support each conviction. *See Chukes*, 2003 UT App 155, ¶ 20; *id.* ¶ 21 (stating that multiple acts may be charged as separate offenses if one could be committed without necessarily committing the other or they are separated by time and space sufficient to create an independent ground for a conviction on each offense); *see also State v. Roth*, 2001 UT 103, ¶ 8, 37 P.3d 1099 (upholding separate convictions for possession of methamphetamine and possession of equipment or supplies with intent to engage in a clandestine laboratory operation where the special verdict form indicated that the clandestine laboratory conviction was based on possession of manufacturing

equipment rather than the methamphetamine that formed the basis of the possession conviction).

¶15 The record evidence, however, does not support a conclusion that the convictions were based on separate conduct. For example, there is nothing in the record that shows that Berriel was in possession of the knife with intent to assault prior to the assault itself. Rather, the witnesses first place Berriel in possession of a knife as he is running toward Luis, that is, in the course of actually assaulting him. Indeed, the State itself, in its closing statement, told the jurors that they might not be able to determine precisely when Berriel formed his intent to assault Luis, thus conceding by implication that the same limitation applied to his *possession* of the knife with the requisite intent:

> Now whether that was intent on the drive over or whether or not he *formulated that intent in the moment* is unclear but he manifested his intent to fight. . . . It is not [the State's] burden to show that [Berriel] had the intent to assault on his drive over. All we have to show is that *at some point during this altercation* he did have the intent to do what he did . . . .

(Emphases added.) Although the jury may have been able to draw an inference that Berriel arrived with the knife based on the fact that he came in his own car and the absence of any testimony that Berriel obtained the knife upon arriving, such an inference does not constitute independent evidence sufficient to uphold separate convictions because it is necessarily derived from the direct evidence of the assault itself, i.e., Berriel's possession of the weapon as he charged at Luis.[10] *See generally United States v. Gore*, 154 F.3d 34, 43-47 (2d Cir. 1998) (applying the "independent evidence" doctrine adopted by other circuits to require evidence that the defendant actually

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10. As the State conceded at oral argument, defense counsel's remarks in opening statement and closing argument that Berriel was in possession of the knife when he went to the house were not evidence. The trial court properly instructed the jury not to consider the attorney's statements as fact.

possessed drugs in addition to the amount he sold to be convicted of both possession of a controlled substance and distribution of a controlled substance).[11]

¶16 Moreover, the jury was not specifically instructed that its convictions for each offense had to be based on separate evidence. Our precedent is clear that not only must separate convictions for offenses arising out of the same criminal episode be based on different facts but that the jury must be so instructed. *See generally State v. Chukes*, 2003 UT App 155, ¶¶ 23, 26-27, 71 P.3d 624 (vacating the defendant's conviction for forgery where "the [arguments,] instructions[,] and evidence at trial" did not inform the jury that "it had to find an additional element beyond the elements of [identity fraud] before it could convict defendant of forgery," that is, the convictions could not be based on the same forged writings (alterations in original) (internal quotation marks omitted)); *State v. Ross*, 951 P.2d 236, 242 (Utah Ct. App. 1997) (concluding that the forgery offense was included within the communications fraud conviction where the jury was not "'required to find'" that the communications fraud was based on separate acts (quoting *State v. Bradley*, 752 P.2d 874, 878 (Utah 1988) (per curiam))). *Cf. Roth*, 2001 UT 103, ¶ 8 (upholding separate convictions where the jury filled out a special verdict form that indicated that the clandestine laboratory conviction was based on the defendant's possession of equipment rather than on the possession of the methamphetamine that formed the basis of the possession conviction). Nothing in the jury instructions informed the jury that the possession conviction could not be based simply on Berriel's possession of the knife during the assault, nor did the evidence or assertions of counsel clarify the matter. Thus, because "the [arguments,] instructions[,] and evidence at trial" did not clearly inform the jury that it had to find a separate factual basis for the possession of a deadly weapon with intent to assault conviction beyond the possession

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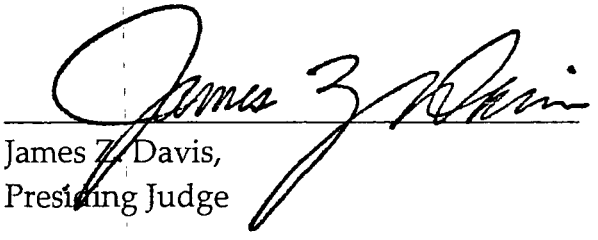
11. Even if there were evidence that Berriel possessed the knife for some significant period of time prior to the assault, the lesser included offense limitation may still have precluded separate convictions. An offense is included within another if "[i]t constitutes an attempt, solicitation, conspiracy, or *form of preparation* to commit the offense charged." Utah Code Ann. § 76-1-402(3)(b) (2008) (emphasis added). Because Berriel has not asserted that the possession of the knife was a "form of preparation" to commit the aggravated assault and because the facts upon which the convictions were based are so narrow, we need not consider whether Berriel's acts prior to committing the assault were a "form of preparation" and reserve this issue for another day when a showing of an independent factual basis has been made.

necessary to commit the aggravated assault, his conviction for possession of the knife with intent to assault is not independently sustainable. *See Chukes*, 2003 UT App 155, ¶ 23 (alterations in original) (internal quotation marks omitted). We therefore vacate Berriel's conviction for possession of a deadly weapon with an intent to assault.

¶17 Affirmed in part and reversed in part.

Stephen L. Roth, Judge

¶18 I CONCUR:



James Z. Davis,
Presiding Judge

THORNE, Judge (concurring and dissenting):

¶19 I dissent from the majority opinion as to its defense-of-others analysis but concur as to the remainder. I agree with the majority opinion that, under the circumstances of this case, Berriel's conviction for possession of a deadly weapon with intent to assault must be vacated as a lesser included offense of his aggravated assault conviction. However, I disagree with the majority's conclusion that Berriel was not entitled to a jury instruction on defense of others. I would reverse both of his convictions on that basis in addition to vacating the weapons charge on the grounds cited by the majority.

¶20 Pursuant to Utah Code section 76-2-402, "[a] person is justified in threatening or using force against another when and to the extent that the person reasonably believes

that force . . . is necessary to defend . . . a third person against another person's imminent use of unlawful force." Utah Code Ann. § 76-2-402(1) (Supp. 2011). The statute expressly assigns the questions of imminence and reasonableness to the "trier of fact" and provides a nonexclusive list of factors to be considered in making that determination. *See id.* § 76-2-402(5).[1] Although a defendant's entitlement to a defense-of-others instruction is "conditioned upon the existence of a reasonable basis in the evidence to justify the giving of the proposed instruction," *State v. Eagle*, 611 P.2d 1211, 1213 (Utah 1980), a requested instruction should be given "if there is *any* reasonable basis in the evidence to justify it," *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (emphasis added). *See also State v. Garcia*, 2001 Utah App 19, ¶¶ 8-9, 18 P.3d 1123 (discussing self-defense instructions).

¶21 Multiple witnesses testified about a phone call from Rachel to Berriel shortly before the stabbing, informing Berriel that Luis was beating Rachel. One of Berriel's companions testified that Rachel's call prompted the group to go to her house to help her because Luis had been hitting her. Another testified that Rachel was crying because Luis was hitting her. And a third, Scott Carlisle, testified that Rachel was screaming and crying on the phone, that he thought Rachel was being beaten because it had happened before, and that after the phone call Berriel indicated that the group should go to Rachel's house because she was being beaten up.

¶22 A reasonable jury could easily conclude from this testimony that, at the time Berriel spoke with Rachel on the phone, she was in imminent danger and the use of reasonable force in her defense at that moment would have been justified under the statute. The question before us is whether Berriel continued to have a reasonable belief that she *remained* in imminent danger a short time later,[2] when Luis and Rachel arrived

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1. These factors include the nature and immediacy of the danger, the probability of death or serious injury, and prior incidents of violence of relevance to the situation. *See* Utah Code Ann. § 76-2-402(5)(a)-(e) (Supp. 2011).

2. The majority opinion relies on Rachel's testimony that her trip with Luis took fifteen to twenty minutes and Luis's testimony that the only phone available to Rachel was a home phone to infer that at least fifteen minutes elapsed between the time of Rachel's call to Berriel and the subsequent altercation. I am not inclined to reach the same

(continued...)

home and the altercation between Luis and Berriel occurred. The majority concludes that from the time Luis arrived home until the time of the stabbing, Luis had not "threatened, touched, harmed, or even approached Rachel in any way, nor had he exhibited any weapons," and that, as a result, "there was no evidence that Rachel was in imminent danger at the time Berriel attacked Luis." *See supra* ¶ 5.

¶23 In my view, once Berriel had a reasonable basis to believe that Rachel was in imminent danger due to her phone call, his actions in her defense were potentially justifiable under Utah Code section 76-2-402 *until* such time as Berriel had reason to believe that the danger to Rachel had passed.[3] There was testimony to suggest that Berriel's observations of Luis's arrival at Rachel's house were too brief and hurried to have given Berriel notice that Luis no longer posed a threat to Rachel. Carlisle testified that when he arrived at Rachel's house with Berriel, neither Rachel nor Luis was there. The State then asked Carlisle, "So what did you do?" Carlisle responded, "We were walking back to the car and that guy drove up, her boyfriend, jumped out of the car and ran towards [Berriel]."

¶24 Based on this testimony, reasonable jurors could conclude that as soon as Luis arrived, he jumped from his car and charged at Berriel in an angry and hostile manner. These actions raised the additional issue of self-defense, but they also deprived Berriel of any meaningful opportunity to revise his assessment of the ongoing danger to Rachel. Absent such an opportunity, Berriel had insufficient information and opportunity to believe that the threat to Rachel had dissipated and was therefore entitled to act in the continued belief that Rachel remained in danger as well as to

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2. (...continued)
inference in light of the ubiquitous presence of mobile phones in today's culture and particularly amongst young adults. Rachel did not testify as to exactly when or from where she called Berriel, and in the absence of clear testimony as to the timing of the phone call, I believe that the jury could reasonably have concluded that the interval may well have been somewhat less than fifteen minutes.

3. I recognize that the mere passage of time could, in some circumstances, give reason to infer that a particular threat has ended. However, the potentially quite short period of time between Rachel's phone call and the ultimate altercation in this case does not give rise to such an inference.

defend himself. Carlisle's testimony thus provides some reasonable basis upon which to conclude that Berriel reasonably believed that Rachel *remained* in danger and that using force against Luis in her defense remained justified.[4]

¶25 In light of the evidence, an instruction on defense of others was critical to Berriel's defense, not only for its potential to provide an independent justification for his presence and subsequent actions, but also as a necessary complement to the self-defense instruction. The jury was instructed that Berriel was not justified in using force in self-defense if he was the "aggressor,"[5] and there was certainly evidence to suggest that Berriel had gone to Rachel's house, armed, with an intent to confront Luis. A defense-of-others instruction would have allowed Berriel to argue that this decision was a legally justified act in Rachel's defense and did not render Berriel the aggressor as between Berriel and Luis.[6] Thus, the defense-of-others instruction was necessary to fully implement the self-defense instruction and to provide Berriel with a seamless defense if he could convince the jury that he first acted in defense of Rachel and then transitioned into also defending himself as Luis turned his violence towards him.

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4. Carlisle's version of events, if believed, distinguishes this case from the authorities the majority cites in which the person to be defended was either not present or had clearly broken free from the hostilities. *See Harris v. Scully*, 779 F.2d 875, 877, 879 (2d Cir. 1985) (denying instruction where defendant's mother apparently remained inside a house, altercation took place outside the house, and defendant's brother had broken free from the fight); *State v. Hernandez*, 861 P.2d 814, 820 (Kan. 1993) (denying instruction where person allegedly defended was not present).

5. The instruction stated, in part, "A person is not justified in using force which is intended or likely to cause death or serious bodily injury if he: . . . was the aggressor or was engaged in combat by agreement . . . ."

6. Such an argument was particularly vital here, where Berriel was charged with possession of a weapon with intent to assault. The jury could have concluded that Berriel possessed the weapon at the time of the phone call and at all times thereafter. Thus, it was critical for Berriel to be allowed to argue that his possession of the knife was with a legally-justifiable intent to potentially defend Rachel or himself if necessary, rather than any intent to commit a criminal assault against Luis.

¶26 I also note that it is highly relevant that the threat to Rachel was one of domestic violence. This court has recognized on multiple occasions that "a domestic violence complaint is one of the most potentially dangerous, volatile arrest situations confronting police." *State v. Vallasenor-Meza*, 2005 UT App 65, ¶ 16, 108 P.3d 123 (internal quotation marks omitted); *see also State v. Comer*, 2002 UT App 219, ¶ 25, 51 P.3d 55 (same); *State v. Richards*, 779 P.2d 689, 691 (Utah Ct. App. 1989) (same). In *State v. Vallasenor-Meza*, 2005 UT App 65, 108 P.3d 123, police responded to reports of a domestic dispute at the defendant's house. The defendant was initially reluctant to cooperate with the officers, but eventually "explained to the officers that there had been a fight, but the woman involved had since gone to work." *Id.* ¶ 18. Despite this explanation, the court determined that exigent circumstances justified the officers entering the house without a warrant due to their reasonable belief that "the victim was potentially inside the residence injured or unconscious, and that their immediate intervention was necessary." *Id.* ¶ 19.

¶27 If the jury was to believe Carlisle's version of events, Berriel's defense-of-others claim seems even stronger than the claim of police exigency in *Vallasenor-Meza*. Berriel was aware of a history of domestic violence between Luis and Rachel, became aware of a new and potentially ongoing domestic violence incident perpetrated by Luis against Rachel, and went to assist Rachel against that clear threat. When Berriel came into contact with Luis and Rachel, it was not obvious that their hostilities were continuing but it was also not obvious that they had ceased. Berriel did not know if Rachel was "injured or unconscious," *see id.*, if she was being held in Luis's vehicle against her will or under duress of his threats, or if Luis's beating of her would continue as soon as Luis was not busy driving. Importantly, Berriel's ability to confirm that Rachel was no longer in danger was short-circuited by Luis's jumping from the car and running at Berriel—an aggressive act that was entirely consistent with the violence against Rachel that had brought Berriel to the scene in the first place.

¶28 In light of Carlisle's testimony, the interplay between self-defense and defense of others in this case, and the clear and very real danger presented by Luis's repeated acts of domestic violence, Berriel was entitled to his requested instruction on the defense of others.[7] The district court's refusal to give such an instruction deprived Berriel of the

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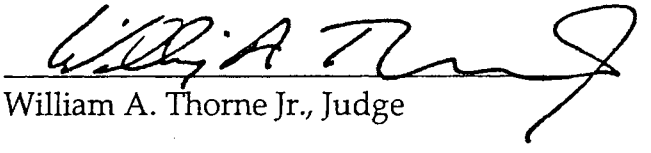
7. Of course, a jury would not be obligated to ultimately find the facts in Berriel's favor on his defense-of-others defense or any other issue. Nevertheless, he was entitled to make his arguments to a properly instructed jury.

opportunity to present a full and fair defense and, in my opinion, merits reversal of his convictions. For these reasons, I respectfully dissent from the majority opinion on this issue but concur in the remainder.



William A. Thorne Jr., Judge